No. 86-537

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

JAFEH E. PENA
SPECIALIST FIVE, UNITED STATES ARMY
PETITIONER

v.

THE UNITED STATES OF AMERICA,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTION PRESENTED

WHETHER investigating agents' taped accounts of their apprehension and interrogation of petitioner, recorded immediately following the apprehension and interrogation, constituted Jencks Act statements?

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In the Supreme Court of the United States

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No.

JAFEH E. PENA
SPECIALIST FIVE, UNITED STATES ARMY,
PETITIONER,

v.

THE UNITED STATES OF AMERICA,
RESPONDENT,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Jafeh E. Pena, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals entered in this proceeding.

OPINIONS BELOW

The opinion of the Court of Military Appeals is reported at 22 M.J. 281 (C.M.A. 1986) (Appendix A). The opinion of the Army Court of Military Review is unpublished, CM 444139 (A.C.M.R. 12 Oct. 1984) (Appendix B).

JURISDICTION

The judgment of the Court of Military Appeals was entered on August 4, 1986, affirming petitioner's conviction dated January 23, 1983. The jurisdiction of the Court is invoked under 28 U.S.C. § 1259.

STATUTORY PROVISIONS INVOLVED

The Jencks Act, 18 U.S.C. § 3500 provides:

> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion

of the defendant, order the United States to produce any statement . . . of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified.

. . . .

(d) If the United States elects not to comply with an order of the court . . . to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement" . . . means–

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

STATEMENT OF THE CASE

On October 29, 1982, two agents of the Army Criminal Investigation Command (CID) apprehended petitioner for distribution of cocaine (R. 748). Their interrogation of petitioner resulted in a signed confession (Prosecution Exhibit 9). Later that day, each agent used a tape recorder to dictate from memory a report of the investigation (*see* R. 307). The tapes were transcribed into typewritten form by a secretary and were subsequently erased when they were reused (R. 736, 766). The typed reports, dated October 29, 1982, were

were signed by the agents and copies were given to defense counsel. One agent testified that the typed report was "exactly what I taped on the tape recorder" (R. 737).

At trial, the two CID agents testified during the government's case-in-chief regarding the events and activities contained in their investigation reports. Defense counsel moved to strike their testimony under the Jencks Act, 18 U.S.C. § 3500 [hereinafter cited as the Jencks Act or the Act], on the basis of the government's non-production of the tape recordings. The military judge denied the motion, finding that the tape recordings were destroyed in the normal course of business and that they were not subject to production under the Jencks Act (R. 771; Special Findings for Denial of Jencks Act Motion to Strike the Testimony of Special Agents Mungle and Cornelius). Contrary to his pleas, petitioner was convicted of the possession and distribution of cocaine and sentenced to confinement for eighteen months and reduction to the grade of Private E-1. The question presented in this petition has been fully litigated at every stage of the appellate process. As a prerequisite to the Court's jurisdiction, the Court of Military Appeals granted the following issue:

> WHETHER THE MILITARY JUDGE ERRONEOUSLY DENIED A DEFENSE MOTION TO STRIKE THE DIRECT TESTIMONY OF TWO GOVERNMENT WITNESSES FOLLOWING THE GOVERNMENT'S FAILURE TO PRODUCE A TAPE RECORDING OF THEIR REPORT IN REFERENCE TO THE APPELLANT'S CASE.

REASON FOR GRANTING THE WRIT

Congress enacted the Jencks Act to provide for sanctions when the government fails to provide the defense with prior relevant statements of testifying government witnesses. Appellate courts are split on the issue of what types of statements are producible under the Act and when their non-production will result in sanctions. The

Court's opinion on this important federal question is necessary to resolve the conflict between the circuits.

I. THE TAPES WERE JENCKS ACT STATEMENTS WHICH SHOULD HAVE BEEN PRESERVED BY THE GOVERNMENT.

In *Jencks v. United States*, 353 U.S. 657 (1957), the Court held that criminal defendants in federal courts were entitled to inspect government records of prior statements of prosecution witnesses. Lower courts' expansive interpretation of this right to production led to defense "fishing expeditions" which, in turn, prompted Congress to enact the Jencks Act in an effort to correct this perceived abuse of the trial process. *Goldberg v. United States*, 425 U.S. 94, 102-105 (1976). The Act reaffirmed that " 'a defendant on trial in a criminal prosecution is entitled to relevant and competent reports and statements in possession of the government touching the events and activities as to which a government witness has testified at the trial.' " *Id.* at 104, *quoting* S. Rep. No. 981, 85th Cong., 1st Sess., 3 (1957), 1957 U.S. Code Cong. & Ad. News 1862. The Act established clear guidelines, *e.g.*, production is required only after the witness has testified on direct examination and is limited to matters relevant to that testimony. There are clear sanctions for non-production, *i.e.*, the striking of the testimony or the declaration of a mistrial.

In the instant case, the court below held that "the Government's failure to preserve the tape recordings, which were transcribed substantially verbatim into typewritten investigation reports, did not constitute a violation of the Jencks Act." *Pena*, 22 M.J. at 283. Implicit in the holding was the determination that the tapes were not Jencks Act statements. This conclusion was erroneous since the tapes were materials relating to the petitioner's apprehension and subsequent confession to which the CID agents testified on direct examination. In *Clancy v. United States*, 365 U.S. 312 (1960), the Court held that agents' notes and memoranda prepared subsequent to conversations with certain petitioners were

Jencks Act statements.[1] Different only in form from the notes and memoranda in *Clancy*, the tapes in the instant case were "statements" within the meaning of the Act.

For its conclusion that the tapes were not Jencks Act material, the Court of Military Appeals relied on four circuit court cases, *i.e.*, *United States v. Ammar*, 714 F.2d 238 (3d Cir. 1983), *cert. denied*, 464 U.S. 936 (1983), *United States v. Soto*, 711 F.2d 1558 (11th Cir. 1983), *United States v. Bastanipour*, 697 F.2d 170 (7th Cir. 1982), *cert. denied*, 460 U.S. 1091 (1983), and *United States v. Kaiser*, 660 F.2d 724 (9th Cir. 1981), *cert. denied*, 455 U.S. 956 (1982). *Pena*, 22 M.J. at 283. All four cases held that rough notes and drafts of reports made during investigation (*Soto*, 711 F.2d at 1562; *Kaiser*, 660 F.2d at 731-732) or memoranda prepared subsequent to interviews with the defendants (*Ammar*, 714 F.2d at 258-259; *Bastanipour*, 697 F.2d at 174) were not Jencks Act statements. The rationale of these cases is faulty for three reasons.

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[1] *See also* United States v. Bufalino, 576 F.2d 446 (2d Cir. 1978), *cert. denied*, 439 U.S. 928 (1978) (destroyed backup recordings made by a radio receiver surveillance unit carried by extortion victim of conversations with the defendant were Jencks Act statements); United States v. Carrasco, 537 F.2d 372 (9th Cir. 1976) (destruction of confidential informant's diary of drug transaction with defendant was Jencks Act violation); United States v. Johnson, 521 F.2d 1318 (9th Cir. 1975) (agent's handwritten notes of interview with the defendant at time of arrest were producible statements); Holmes v. United States, 271 F.2d 635 (4th Cir. 1959) (non-production of FBI agent's memoranda and notes prepared during investigation and conversations with the defendants was reversible error). *Cf.* United States v. Harris, 543 F.2d 1247 (9th Cir. 1976) (original notes taken by agents during interviews with prospective witnesses or with an accused must be preserved so that courts may play their proper role in determining what evidence must be produced); United States v. Harrison, 524 F.2d 421 (D.C. Cir. 1975) (agent's handwritten notes taken during interviews with robbery eyewitnesses were required to be preserved and produced even if the notes were not Jencks Act statements). *But see* United States v. Hinton, 719 F.2d 711 (4th Cir. 1983), *cert. denied*, 465 U.S. 1032 (1984) (government has no obligation to preserve agents' interview notes with potential witnesses); United States v. Bagnariol, 665 F.2d 877, 889-890 (9th Cir. 1981) (non-production of agent's handwritten drafts made after meetings with defendants not Jencks Act violation); United States v. Martin, 565 F.2d 362 (5th Cir. 1978) (destruction of agent's handwritten notes of interviews with defendant did not violate Jencks Act).

First, there is a fundamental misinterpretation of 18 U.S.C. § 3500(e) that the determination of what constitutes a statement depends on the point in time during the investigation that it was made. For instance, *Ammar* distinguished between three categories of documents:

> (1) contemporaneous rough notes taken by a government agent of meetings, conversations, or interviews during the course of his or her investigation; (2) the agent's subsequently prepared drafts of his reports of these incidents; and (3) the final report signed by the agent.

714 F.2d at 258 (citation omitted). Only documents in the first and third categories were deemed to be Jencks Act statements.[2] *Id.* at 258-259. This Court rejected this interpretation in *Clancy*:

> The requirement that it [a statement] be contemporaneous applies only to a "substantially verbatim recital of an oral statement" made [by the testifying witness] to a government agent. By the terms of the Act, "a written statement made by said witness and signed or otherwise adopted or approved by him" is also included. These statements [memoranda prepared after interviews with petitioners] fell in that category and should have been produced.

365 U.S. at 314-315 (footnotes and citations omitted). Thus, in the situation as in the instant case where the testifying witness is the government agent, any notes, memoranda or drafts made by that agent in the course of investigation are producible statements under the Act.

Secondly, subsection (e)(1) of the Act is misread to mean that only "final" reports of the testifying government agent are Jencks Act material. *See Ammar*, 714 F.2d at 259 (agent's handwritten accounts of meetings and conversations

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[2] Despite its conclusion that rough drafts are generally not Jencks Act statements, the *Ammar* court nevertheless held that thereafter the government had to retain and make available both the rough notes and the drafts of reports of its agents to facilitate the district court's determination of whether they should be produced. 714 F.2d at 259.

with petitioners were not Jencks Act statements where such drafts were not shown to agent's supervisor); *Kaiser*, 660 F.2d at 732 (agent's handwritten draft of a report pertaining to his controlled purchase of heroin from the defendant was not producible because the draft "was not intended as a final report.").[3] It is argued that agents' rough notes are usually considered to be too cryptic and incomplete to constitute a "full" statement envisioned by the Act.[4] *United States v. Griffin*, 659 F.2d 932, 937 (9th Cir. 1981). This is too narrow a reading of 18 U.S.C. § 3500(e)(1). *See United States v. Harrison*, 524 F.2d at 429. Logic and common sense dictate that, if the witness himself wrote the statement, then he has adopted the contents contained within, regardless of whether the statement is in its final form.

A narrow construction of 18 U.S.C. § 3500(e)(1) to require production of only "final" reports or statements would defeat the purpose of the Jencks Act which is to provide a defendant with access to possible impeachment material.[5] As Justice Brennan cautioned in *Palermo v. United States*, 360 U.S. 343 (1959), "[t]here inheres in an overrigid interpretation and application of the statute the hazard of encouraging a practice of government agents' taking statements in a fashion calculated to insulate them from production." *Id.* at 365-366 (Brennan, J., concurring). To limit producible statements to those that are in their "final" form would preclude defense access to matters not contained in the final reports which may nevertheless have impeachment value. It is a recognized pos-

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[3] *See also* United States v. Bagnariol, 665 F.2d at 889-890.

[4] A distinction must be drawn between statements made by the witness which he himself set down on paper and those that were made to a government agent who in turn set forth such statements in writing. In the latter situation, fairness dictates that the witness not be confronted with a truncated version of what he said to another unless he adopted or approved it as his own. Accordingly, the Court held in United States v. Augenblick, 393 U.S. 348, 354-355 (1969) that "rough pencil notes" jotted down by an agent during an interview with a witness were not producible Jencks Act statements to impeach the witness. Where the government agent is the testifying witness and it is his own words for which he is held accountable, there is little danger of being misquoted.

[5] Clancy v. United States, 365 U.S. at 315.

sibility that distortions, omissions or additions on the part of an overzealous government agent may occur in the preparation of the final report. *United States v. Harrison*, 524 F.2d at 430. Thus, a broad interpretation of 18 U.S.C. § 3500 (e)(1) to include all notes, memoranda, tapes, and drafts of reports made at any stage of the investigation by the government agent witness best promotes the intended purpose of the Act.

Finally, the third misconception in the cases relied upon by the court below is a confusion between the issue of what constitutes Jencks Act statements and the issue of whether the sanctions of the Act should apply. In all four cases, it was held that there was no Jencks Act violation where the defense was provided with typewritten final reports which incorporated the handwritten drafts that the defense had requested for production. *See Ammar*, 714 F.2d at 259; *Soto*, 711 F.2d at 1562-1563; *Bastanipour*, 697 F.2d at 174; *Kaiser*, 660 F.2d at 731-732. The fact that the defense was given documents that incorporate the statements at issue is relevant only to the determination of whether the Act's sanctions should apply. *See United States v. Johnson*, 521 F.2d at 1320. This determination is reached only *after* the court finds the statements to be within the meaning of the Act. *United States v. Griffin*, 659 F.2d at 937. Whether a statement is Jencks Act material is a separate question from that of whether the non-production of the statement is harmless error.

Misplaced reliance by the Court of Military Appeals on *Ammar*, *Soto*, *Bastanipour* and *Kaiser* resulted in the court's erroneous conclusion in the instant case that the CID agents' tapes made after apprehending petitioner and after obtaining his confession were not Jencks Act statements.

II. PETITIONER WAS PREJUDICED BY THE DESTRUCTION OF THE TAPES.

The lower court based its conclusion that the tape recordings were "transcribed substantially verbatim into typewritten investigation reports" on the basis of one CID agent's testimony that the typed report was "exactly" what he taped.

Pena, 22 M.J. 282-283. Notably the secretary who transcribed the tapes was not called to testify as to whether the reports were indeed verbatim to the tapes. Instead, the government presented the testimony of the very witness that the defense sought to impeach. Under such circumstances, "the agent plainly is the most unlikely source" to reveal any discrepancies that exist between the requested tapes and the final reports. *United States v. Harrison*, 524 F.2d at 432; *see also United States v. Johnson*, 521 F.2d at 1320 (the determination of whether a producible statement is useful for impeachment purposes "must be left to the defense and should not rest with the very witness whose testimony the defendant seeks to impeach."). The testimony of the government agent responsible for the non-production of the tapes is not sufficient evidence to prove that the reports given to the defense were substantially verbatim to the destroyed tapes. *United States v. Carrasco*, 537 F.2d at 377 (where there was only the testimony of the government agent, who destroyed the confidential informant's notes pertaining to a controlled purchase of heroin from defendant on the basis that the notes were incorporated in the agent's report, it was inferred that the report did not incorporate the notes).

Additionally, there was no evidence offered to show that the second CID agent's tape was transcribed substantially verbatim into his typewritten report. The record's silence precludes a harmless error analysis and mandates reversal. *Clancy v. United States*, 365 U.S. at 316.

It was prejudicial error not to invoke the Act's sanctions against the government for its destruction of the tapes. Contrary to the purpose of the Jencks Act, the government denied potentially valuable impeachment evidence to the defense. It is impossible now to know what were in the tapes. Conceivably, they contained matters with which defense counsel could have successfully impeached both CID agents' testimony upon which the prosecution's case was based.

At trial, defense counsel moved to suppress evidence seized incident to apprehension based on the lack of probable cause to apprehend (*see* R. 155). Also, a motion was made to suppress petitioner's confession based on an involuntary waiver

of his rights to consult with counsel and to remain silent. Without the confession and the incriminating evidence seized incident to apprehension, there would have been insufficient evidence to convict petitioner of the possession charge.[6] It is possible that the tapes contained matters that would have supported the defense contentions that there was no probable cause to apprehend and that the confession resulted from excessive force by the agents.

Further, omissions from the agents' final reports is not simply pure speculation. One agent admitted an omission from his report concerning the manner in which petititoner's confession was obtained (R. 337). The other agent omitted from his report the details of the apprehension. On motion, petitioner testified that he had not been properly advised of his right to remain silent and to the discrepancies between what he actually said to the agents and the statement that they typed for him to sign (*see* R. 416-419). These factors cast doubt on the credibility of the agents and render the completeness of their final reports suspect, thereby supporting the inference that the non-production of the tape recordings was prejudicial.

The government must be made to realize that its disregard of the Jencks Act's mandate is not without a price. The Act's sanctions must be brought to bear upon the government; otherwise, the Act is but a hollow threat. The lower court's decision in the instant case only reinforces the government's continued disregard of the Act. The split in the federal circuits with respect to the issue of what types of statements fall within the Act's purview has resulted in inconsistent application of the Act. Guidance from the Court is crucial to resolve this conflict.

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[6] The other possession charge, which petitioner had also been convicted of, was dismissed by the Army Court of Military Review as Multiplicious with the distribution conviction. *Pena*, 22 M.J. at 281.

CONCLUSION

For the foregoing reasons the petition for certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

No. 51266.
CM 444139.

UNITED STATES, APPELLEE

v.

JAFEH E. PENA, SPECIALIST FIVE, U.S. ARMY, APPELLANT.

August. 4, 1986.

For Appellant: *Captain Lorraine Lee* (argued); *Lieutenant Colonel William P. Heaston, Captain Annamary Sullivan, Captain Robert S. Johnson, Jr.* (on brief); *Colonel William G. Eckhardt, Major Eric T. Franzen, Captain Harry L. Williams, Jr.*

For Appellee: *Captain John F. Burnette* (argued); *Colonel James Kucera, Lieutenant Colonel Adrian J. Gravelle, Major Byron J. Braun* (on brief); *Captain Andrew D. Stewart.*

Opinion of the Court

COX, Judge:

Appellant was tried by general court-martial at Ft. Belvoir, Virginia, during December 1982 and January 1983. Contrary to his pleas, he was convicted by a panel of officer members of possession and distribution of cocaine on October 8, 1982, and possession of cocaine with intent to distribute on October 29, 1982, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. His sentence to confinement for 18 months and reduction to E-1 was approved by the convening authority. The Court of Military Review dismissed the October 8 possession offense as multiplicious for findings with

the distribution offense of the same date and affirmed the sentence.

We granted review of two issues:

I

WHETHER THE MILITARY JUDGE ERRONEOUSLY DENIED A DEFENSE MOTION TO STRIKE THE DIRECT TESTIMONY OF TWO GOVERNMENT WITNESSES FOLLOWING THE GOVERNMENT'S FAILURE TO PRODUCE A TAPE RECORDING OF THEIR REPORT IN REFERENCE TO THE APPELLANT'S CASE.

Appellant was apprehended by two CID agents on October 29, 1982, for distribution of cocaine. While being interviewed by the agents, appellant made both an oral and written confession. Later that day, each agent used a tape recorder to dictate from memory a report of the investigation of appellant. The tapes were transcribed into typewritten form by a secretary and were thereafter reused in accordance with usual office procedure. One agent testified that the typed product was "exactly what I taped on the tape recorder." Each typed "Agent's Investigation Report" was signed by the agent as his official report and defense counsel was furnished a copy of the agents' typed, signed reports.

The two CID agents testified during the Government's case-in-chief regarding the events and activities contained in their investigation reports. Because the Government was unable to produce the tapes, defense counsel moved under the Jencks Act, 18 U.S.C. § 3500, to strike the testimony of the agents. The military judge denied the motion to strike, finding that the tape recordings were destroyed in the normal course of business and that they were not subject to production under the Jencks Act.

The Jencks Act has long been applied to trials by courts-martial. *United States v. Walbert,* 14 U.S.C.M.A. 34, 33 C.M.R. 246 (1963). It requires the Government, upon request of the defense after a government witness has testified, to produce any prior "statement" of the witness relating to the

subject matter about which the witness has testified.* The purpose of the Act is to provide the defense information with which to impeach the witness. *Palermo v. United States*, 360 U.S. 343, 79 S.Ct. 1217, 3 L.Ed.2d 1287 (1959). The Act defines "statement" as

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

18 U.S.C. § 3500(e).

Clearly, under the Act the signed, typed reports are "statements" of the agents who prepared the reports. *Clancy v. United States*, 365 U.S. 312, 81 S.Ct. 645, 5 L.Ed.2d 574 (1961). Copies of these reports were properly furnished to the defense and available for possible impeachment of the agents during cross-examination.

The Act also includes statements recorded on tape. *Cf. United States v. Marsh*, 21 M.J. 445 (C.M.A. 1986) (Jencks Act applies to tapes of statements made by government witnesses at Article 32, UCMJ, 10 U.S.C. § 832, hearing). Thus, if the reports had been dictated, but not transcribed, that happenstance alone would not exempt the tapes from the production requirement of the Act. *See United States v. Merlino*, 595 F.2d 1016 (5th Cir. 1979), *cert. denied*, 444 U.S. 1071, 100 S.Ct. 1014, 62 L.Ed.2d 752 (1980); *United States v. Walbert, supra*. Because the tapes were transcribed, however, the question becomes whether the Jencks Act requires the Government to produce both the typed reports and the tapes from which the typed reports were transcribed.

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*R.C.M. 914, Manual for Courts-Martial, United States, 1984, tracks the language of the Jencks Act, but it also includes disclosure of prior statements by defense witnesses other than the accused.

Appellant contends that the defense should have been provided with both, expressing concern that the agents may have tailored their reports to fit their conclusions. If this were the case, it is difficult to visualize how appellant would benefit from having both the taped and typed versions of the reports. Certainly, if the agents desired to distort or fabricate their accounts, this could easily have been accomplished when they dictated the tapes.

Unless the secretary failed to perform his or her duties properly, the typed reports would be virtually identical to the material on the tapes. In fact, there was testimony to this effect. The tapes were obviously dictated only for the purpose of having the data transferred to a typed report. There is no indication whatsoever of substantive differences between the taped versions left with the secretary and the typewritten reports signed by the agents. It appears, therefore, that the same information was available to the defense, just in a different format.

We hold that the Government's failure to preserve the tape recordings, which were transcribed substantially verbatim into typewritten investigation reports, did not constitute a violation of the Jencks Act. *Cf. United States v. Ammar*, 714 F.2d 238, 259 (3d Cir.) *cert. denied*, 464 U.S. 936, 104 S.Ct. 344, 78 L.Ed.2d 311 (1983) (rough draft of agent's report, which is later typed verbatim, ordinarily not statement under Jencks Act); *United States v. Soto*, 711 F.2d 1558 (11th Cir. 1983) (handwritten draft of agent's report not statement under Jencks Act); *United States v. Bastanipour*, 697 F.2d 170, 174 (7th Cir. 1982), *cert. denied*, 460 U.S. 1091, 103 S.Ct. 1790, 76 L.Ed.2d 358 (1983) (agent's failure to retain handwritten draft of typed report did not violate Jencks Act); *United States v. Kaiser*, 660 F.2d 724, 731–32 (9th Cir. 1981), *cert. denied*, 455 U.S. 956, 102 S.Ct. 1467, 71 L.Ed.2d 674 (1982) (handwritten draft not statement under Jencks Act).

II

WHETHER THE CONVENING AUTHORITY ERRED TO THE SUBSTANTIAL PREJUDICE OF THE AP-

PELLANT BY TAKING ACTION ABSENT ANY INDICATION THAT THE REVIEW HAD BEEN SERVED ON THE DEFENSE.

The Government concedes that the mandate of *United States v. Goode*, 1 M.J. 3 (C.M.A. 1975), was not followed in that there is no proof that defense counsel was ever served with a copy of the staff judge advocate's post-trial review. Because no deficiency in the review has been specified, however, we find no prejudicial error. *United States v. Smart*, 21 M.J. 15 (C.M.A. 1985).

The decision of the United States Army Court of Military Review is affirmed.

Chief Judge EVERETT concurs.

Judge SULLIVAN did not participate.

APPENDIX B

UNITED STATES ARMY COURT OF MILITARY REVIEW

Before
SUTER, RABY, and COHEN
Appellate Military Judges

CM 444139

UNITED STATES, APPELLEE

v.

SPECIALIST FIVE, JAFEH E. PENA
SSN 055-52-1475
United States Army, Appellant

United States Army
Transportation Center
and Fort Eustis

W. R. Iskra, Military Judge

Colonel William G. Eckhardt, JAGC, Lieutenant Colonel William P. Heaston, JAGC, Captain Harry L. Williams, Jr., JAGC, and Captain Robert S. Johnson, JAGC, were on the pleadings for appellant.

Colonel James Kucera, JAGC, Lieutenant Colonel Adrian J. Gravelle, JAGC, Major Thomas J. LeClair, JAGC, and Captain Charles S. Arberg, JAGC, were on the pleadings for appellee.

12 October 1984

MEMORANDUM OPINION

COHEN, Judge:

Appellant was convicted of wrongful distribution and possession of cocaine on 8 October 1982, and possession of co-

caine with the intent to distribute it on 29 October 1982, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934 (1976). He was sentenced to confinement at hard labor for eighteen months and reduction to the lowest enlisted grade. The convening authority approved the sentence.

Appellant argues, *inter alia*, that the offenses of distribution and possession of cocaine on the same day were multiplicious for findings purposes. The offenses were treated as multiplicious for sentence purposes. We agree and will take appropriate action in the decretal paragraph. *United States v. Zubko*, 18 M.J. 378 (CMA 1984).

Appellant also argues and the government concedes that the mandates of *United States v. Goode*, 1 M.J. 3 (CMA 1975) were not followed in that there is no proof that the post-trial review was served on either the individual defense counsel or the detailed defense counsel. However, notwithstanding the seriousness of the omission, we find that the appellant has suffered no prejudice. *United States v. Devins*, 5 M.J. 504 (ACMR 1978), *petition denied*, 5 M.J. 216 (CMA 1978), *see also United States v. Kincheloe*, 14 M.J. 40 (CMA 1982). Comparing the nature of appellant's crimes and the sentence imposed and approved, we find that it would be reasonable to conclude that the probability that the comments of the defense counsel would have beneficially affected the convening authority's action, was extremely remote. The appellant's sentence to confinement was remitted and he has been administratively discharged from the service. We are convinced that requiring a new review and action would not serve the ends of justice. The remaining assignments of error are without merit.

The finding of guilty of Specification 2 of the Charge is set aside and that specification is dismissed. The remaining findings of guilty and the sentence are affirmed.

Chief Judge SUTER and Senior Judge RABY concur.

FOR THE COURT:
/s/ WILLIAM S. FULTON, JR.
William S. Fulton, Jr.
Clerk of Court

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No. 86-537

In the Supreme Court of the United States

OCTOBER TERM, 1986

JAFEH E. PENA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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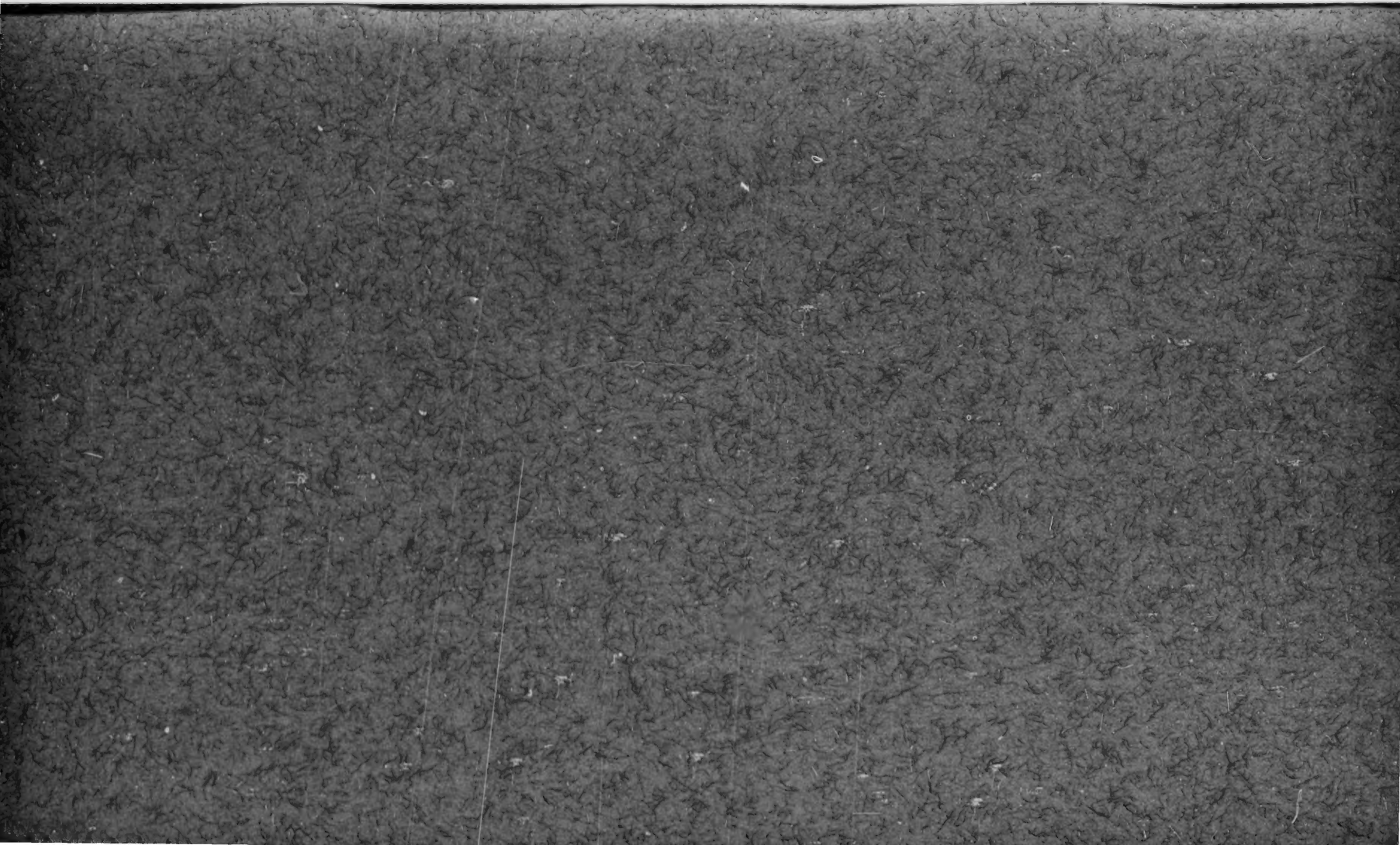

QUESTION PRESENTED

Whether the tape-recorded drafts of agents' reports are "statements" of the agents within the meaning of the Jencks Act, 18 U.S.C. 3500, and whether petitioner was prejudiced by the government's failure to preserve those recordings and produce them for his use at trial.

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No. 86-537

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-5a) is reported at 22 M.J. 281. The opinion of the Army Court of Military Review (Pet. App. 6a-7a) is unreported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on August 4, 1986. The petition for a writ of certiorari was filed on October 2, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. II) 1259(3).

STATEMENT

1. Petitioner, a member of the United States Army, was tried by a general court-martial at Fort Belvoir, Virginia. At the conclusion of trial, he was convicted of possessing and distributing cocaine on October 8, 1982, and possessing cocaine on October 29, 1982, with intent to distribute it, in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. 934. He was sentenced to 18 months' confinement and a reduction in rank. The convening authority reviewed the case and approved the findings and sentence. On February 9, 1984, the Secretary of the Army remitted the unexecuted portion of the sentence to confinement and granted petitioner an administrative discharge. The Army Court of Military Review dismissed the possession specification of the first charge as multiplicitous, but it affirmed the remaining findings and sentence (Pet. App. 6a-7a). The Court of Military Appeals affirmed the decision of the Court of Military Review (Pet. App. 1a-5a).

2. On October 8, 1982, petitioner sold a quantity of cocaine to a confidential informant of the Fort Belvoir Drug Suppression Team (Tr. 574-576, 650-651). Petitioner was arrested three weeks later by Criminal Investigation Division (CID) Special Agents Henry Mungle and David Cornelius (Tr. 681). A search incident to that arrest revealed petitioner to be in possession of 20 tinfoil packets of cocaine (Tr. 682). Petitioner was advised of his *Miranda* rights and his rights under Article 31 of the Uniform Code of Military Justice, 10 U.S.C. 831 (Tr. 682-683). Petitioner waived his rights and gave a sworn statement admitting his involvement in the sale of cocaine (GX 10).

The two agents testified that following the October 29, 1982, arrest and interview of petitioner, each of them dictated his report into a small, hand-held tape recorder. A secretary transcribed the tapes, converting them into typewritten final reports. The agents then erased the tapes and reused them (Tr. 735-737, 765-766).

At trial, the government provided petitioner's counsel with copies of the agents' typewritten reports. Counsel, however, insisted that under the Jencks Act, 18 U.S.C. 3500, the government was required to preserve and produce not only the final versions of the reports, but also the dictated tape recordings from which the reports were typed (Tr. 771). Because the government no longer had those tapes, counsel moved to strike the testimony of the two agents. The trial judge denied the motion (*ibid.*).

3. The Court of Military Appeals rejected petitioner's argument that the Jencks Act had been violated (Pet. App. 2a-4a). The court found no indication that there was any substantive difference between the Secretary's typed versions of the agents' reports and the typewritten reports signed by the agents (*id.* at 4a). The court also noted that the tapes would not reveal whether the agents had tailored their reports to fit their conclusions, because the agents could have shaped their accounts when they dictated their reports (*ibid.*). Accordingly, the court found it "difficult to visualize how [petitioner] would benefit from having both the taped and typed versions of the reports" (*ibid.*).[1]

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[1] Petitioner did not attempt to call the secretary who transcribed the tapes, even though production of the secretary would have been at government expense. Rule 703, *Manual for Courts-Martial, United States—1984.*

ARGUMENT

Petitioner contends (Pet. 4-8) that it was error for the government not to preserve and produce the tape recordings made by the two investigating agents, even though the government produced copies of the agents' final reports, which were taken directly from the tape recordings.

1. The Jencks Act, 18 U.S.C. 3500(b), requires the government to provide a defendant with any "statement" of the witness in the possession of the government that relates to the subject matter of the witness's testimony. A "statement," for purposes of the Jencks Act, includes a written statement made by the witness and signed or adopted by him, and a mechanical recording "or a transcription thereof, which is a substantially verbatim recital of an oral statement" made by the witness. 18 U.S.C. 3500(e)(2). In this case, petitioner received copies of the agents' final reports, which were transcriptions of their recorded accounts of their meeting with petitioner. The Court of Military Appeals correctly held that the production of the transcriptions of the recorded reports satisfied the Jencks Act, and that the Jencks Act did not require the government to preserve and produce the tape-recorded versions of the reports as well.

When an agent testifies as a witness at trial, any report the agent has prepared that relates to his testimony must be produced for the defense. The courts have uniformly held, however, that the government is not required to produce preliminary drafts of the agent's report. See *United States* v. *Ammar*, 714 F.2d 238, 258-259 (3d Cir.), cert. denied, 464 U.S. 936 (1983); *United States* v. *Soto*, 711 F.2d 1558, 1562 (11th Cir. 1983); *United States* v. *Bastanipour*, 697 F.2d 170, 174-175 (7th Cir.

1982), cert. denied, 460 U.S. 1091 (1983); *United States* v. *Bagnariol*, 665 F.2d 877 (9th Cir. 1981), cert. denied, 456 U.S. 962 (1982); *United States* v. *Kaiser*, 660 F.2d 724, 731-732 (9th Cir. 1981), cert. denied, 455 U.S. 956 (1982); *United States* v. *Griffin*, 659 F.2d 932, 936-938 (9th Cir. 1981), cert. denied, 456 U.S. 949 (1982); *United States* v. *Pacheco*, 489 F.2d 554, 566 (5th Cir. 1974), cert. denied, 421 U.S. 909 (1975). Relying on that consistent line of authority, the Court of Military Appeals correctly held that the agents' destruction of the tape-recorded "drafts" of their final reports in this case did not violate the Jencks Act.

In seeking to counter the authorities relied on by the Court of Military Appeals, petitioner invokes this Court's decision in *Clancy* v. *United States*, 365 U.S. 312 (1961). That decision, he argues, supports his claim that the tape-recorded "draft reports" in this case constituted Jencks Act "statements." The materials at issue in *Clancy*, however, were not drafts, but the final versions of the agents' reports, which were signed by the agents. See 365 U.S. at 314. Those reports, which were not given to the defendants in *Clancy*, were equivalent to the signed reports that *were* given to petitioner in this case. Petitioner's reliance on *Clancy* is therefore misplaced.

More instructive than the *Clancy* case is this Court's decision in *Killian* v. *United States*, 368 U.S. 231 (1961). There, the Court noted that the destruction of agents' notes does not necessarily violate the Jencks Act. The Court observed that "almost everything is evidence of something, but that does not mean that nothing can ever safely be destroyed." 368 U.S. at 242. The Court held that if the notes in that case were "made only for the purpose of transferring the data thereon [to a permanent document]

and if, after having served that purpose, they were destroyed by the agents in good faith and in accord with their normal practice, it would be clear that their destruction did not constitute an impermissible destruction of evidence nor deprive petitioner of any right" (*ibid.*). The facts described in *Killian* are essentially the facts of this case. The agents made the tape-recordings for the purpose of generating reports in a more permanent form. After the data had been transferred to the final reports, the tapes were destroyed in good faith and in accordance with the agents' normal practice (Pet. App. 2a). The destruction of the tapes therefore did not violate the Jencks Act.[2]

The court of appeals cases on which petitioner relies (Pet. 5 n.1) are not on point. Several of those cases involved written or recorded statements of witnesses that unequivocally fell within the definition of "statements" under the Jencks Act. See *United States* v. *Bufalino*, 576 F.2d 446 (2d Cir.), cert. denied, 439 U.S. 928 (1978) (recording of extortion victim's conversations with the defendant); *United States* v. *Carrasco*, 537 F.2d 372, 375 (9th Cir. 1976) (informant's signed statements in diary form). The only issue in those cases was whether the government's failure to preserve the statements constituted reversible error. Other cases cited by petitioner in-

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[2] Although the "draft reports" in this case were in tape-recorded rather than in handwritten form, that should not make a difference in determining their status under the Jencks Act. There is no indication that the portion of the Jencks Act requiring the production of any "mechanical, electrical, or other recording" of a witness's oral statements (18 U.S.C. 3500(e)(2)) was intended to require the preservation and production of draft reports that would not be producible if they were in written form.

volved agents' notes of interviews with third-party witnesses who subsequently testified at trial. Because the verbatim remarks of a witness, as recorded contemporaneously in an agent's notes, are producible "statements," see 18 U.S.C. 3500(e)(2), the destruction of the notes or other recordings of the witness's statements can result in a violation of the Jencks Act. Some courts have therefore required that such notes be preserved. See, *e.g.*, *United States* v. *Harris*, 543 F.2d 1247 (9th Cir. 1976); *United States* v. *Harrison*, 524 F.2d 421 (D.C. Cir. 1975).[3] Those cases, however, do not govern the question presented here—whether an agent's draft report constitutes a "statement" of the agent. Unlike the written or recorded words of a third-party witness, an agent's draft report is not a "statement," because a tentative draft is not the report that the agent adopts as his account of the reported events.

The Third Circuit noted this distinction in *United States* v. *Ammar*, 714 F.2d at 258-259, where it pointed out that an agent's contemporary rough notes of an interview made during the course of an investigation might fall within the Jencks Act, but rough drafts of the agent's final report ordinarily do not. The same distinction is drawn in *United States* v. *Carrasco*, *supra*, a case on which petitioner relies. There, the court noted that although a written statement by a third-party witness that is given to an agent is clearly a Jencks Act "statement," a rough draft from which an agent prepares his final report is not. 537 F.2d at 377. In such cases, the

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[3] *Holmes* v. *United States*, 271 F.2d 635 (4th Cir. 1959), on which petitioner also relies, is wholly inapposite. In that case, the government failed to produce even the agent's final report.

court noted, "[t]he benefits to defendants in those few cases in which revision produces substantial distortion may not justify the costs of retaining all rough notes in all cases" (*ibid.*).

2. Even if the tape-recorded versions of the agents' reports constitute "statements" within the meaning of the Jencks Act, petitioner's counsel was not prejudiced by the destruction of the tapes. As the Court of Military Appeals found, the tapes were transcribed "substantially verbatim" into the final typewritten reports (Pet. App. 4a). Petitioner's counsel therefore would have had no more impeachment material to work with if the tapes had been preserved. Accordingly, the failure to produce the tapes does not require reversal. *Rosenberg* v. *United States*, 360 U.S. 367 (1959).

Petitioner takes issue (Pet. 8-9) with the Court of Military Appeals' conclusion that the final reports were substantially verbatim transcriptions of the tape-recorded draft reports. In fact, however, the record supports the court's finding on that point. Both agents testified that they dictated their reports in lieu of preparing handwritten drafts (Tr. 735-737, 765-767), and both reviewed the typewritten reports made from the dictation tapes before signing them (GXs 10, 12; AX 4). As one of the agents explained, the final report was "exactly what I taped on the tape recorder" (Tr. 737). The other agent testified that his report was dictated on the tape recorder and then typed by a secretary, who prepared the final report based on the dictated version (Tr. 766). Although the second agent did not state that his final report was word-for-word the same as his tape-recorded version, the testimony of the two agents makes it clear that a secretary produced the final

reports directly from the tape-recorded versions. Under those circumstances, and absent any evidence to the contrary, the Court of Military Appeals was fully justified in concluding that there were "no indication whatsoever of substantive differences between the taped versions left with the secretary and the typewritten reports signed by the agents" (Pet. App. 4a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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